IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ABDULKALIQ[†] S. AL-DERAWI, Appellant.	)	No. 61115-1-I DIVISION ONE UNPUBLISHED OPINION FILED: May 18, 2009

AGID, J.—Abdulkaliq Al-Derawi appeals his conviction for second degree assault – domestic violence. He contends that the trial court erred by admitting evidence of the victim's statements as excited utterances because she later admitted to fabricating some of the statements. He further contends that the trial court erred by imposing alcohol and drug related conditions of his sentence when there was no evidence that drug or alcohol use was involved in the charged crime. Because the victim made the statements while still under the stress of the assault and her statement omitted details rather than fabricated facts, we affirm the conviction. But because the trial court lacked authority to impose the community custody conditions relating to

[†] The information filed in superior court refers to appellant as "Abdulkaliq" Al-Derawi. Thus, appellant's first name is spelled "Abdulkaliq" throughout this opinion, even though some court documents refer to him as "Abdulkhaliq."

alcohol and drug use, we remand for resentencing.

FACTS

In the early morning hours on September 13, 2007, Mary Magnum awoke to noise coming from the neighboring apartment where Jennifer Denny lived. Magnum heard loud yelling between Denny and another person. She opened her window and could hear one person's voice outside and Denny's voice inside. She heard Denny yelling at someone to "get out" or "stay out." She then heard a loud banging noise, and both people went back inside the apartment. After approximately 30 minutes of listening to the noises, Magnum called 911.

The 911 operator dispatched police officers to Denny's apartment to investigate the call. Officer James Donner arrived within five minutes and waited for another officer before approaching the apartment. When the other officer arrived, they both walked to the apartment and could hear Denny crying and sobbing inside. The other officer went to the back door, and Donner listened at the front door. Donner heard Denny crying and very upset, saying "he hit me," or "I can't believe he hit me."

Once the other officer was positioned at the back of the apartment, Donner knocked on the front door. Denny asked who was there, and Donner told her it was the police. Denny did not initially believe him, but after a brief exchange, Donner was able to convince her to look out the window while he shone his flashlight on himself. Denny eventually opened the door and let Donner come inside.

Once inside, Donner saw that the apartment was in some disarray and noticed a broken chair near the entrance. According to Donner, Denny was crying and very

upset and it was "obvious" that something had just happened to her. When Donner asked Denny what happened, she said that Al-Derawi had hit and strangled her and left the apartment approximately 10 minutes ago on foot. Donner asked Denny for a description of him and immediately radioed that information to other officers so they could find him.

Donner then asked Denny for more information about the attack on her. She told him that she had left her back door open because it was warm outside and that "all of a sudden" Al-Derawi walked in the back door and wanted to see the children. She then said that because the children were sleeping, she tried to stop him and blocked him from going down the hall. She also said that he pushed her into a wooden chair, breaking the chair's backrest. Next, he pushed her onto the couch, held her down with one hand on her throat and punched her in the left eye with his other hand in a fist. She said she could not breathe while he was strangling her and that she was in pain. She then lost consciousness and awoke on the couch, feeling dizzy. When she looked outside, she saw Al-Derawi smoking a cigarette on the front porch. She then ran to the door and locked it, but Al-Derawi continued to knock on the door. Eventually he left. According to Donner, while Denny was telling him what happened, she "appeared afraid, crying, hysterical."

Donner's observations of Denny's injuries were consistent with her explanation of the attack. He noticed swelling on her left check below her eye and scratches on the left side of her neck from the center toward her ear. Denny would not permit Donner to photograph her and refused to give a written statement or sign a medical release.

While Donner was speaking with Denny, another officer saw Al-Derawi run across a nearby street, coming from the area of Denny's apartment building. The officer followed him into a nearby store and took him into custody inside the store. After being read his Miranda[1] warnings, Al-Derawi admitted to knowing Denny and claimed that she had been calling him all day, but denied being at her apartment that evening. Donner then checked Al-Derawi's cell phone log and confirmed that Denny had in fact called him that day.

Donner later asked Denny if she had invited Al-Derawi to her apartment that day and she denied doing so. He then told her that Al-Derawi's cell phone log contradicted her initial claim that Al-Derawi had come to her apartment unannounced and had no permission to be inside. At that point, she began to cry and admitted to calling Al-Derawi that day.

The State charged Al-Derawi with one count of second degree assault by strangulation. Denny did not testify at trial. The State moved in limine to admit Denny's statements to Donner at the scene under the excited utterance exception to the hearsay rule.[2] Al-Derawi argued that these statements did not qualify as excited utterances because Denny admitted to fabricating the statement that Al-Derawi showed up unannounced or uninvited. The trial court admitted the statements.

At trial, the defense offered Denny's later statements to a defense investigator that she invited Al-Derawi to her apartment that day. In rebuttal, the State offered evidence of a prior assault that Al-Derawi had committed against Denny in 2005 as

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] The State did not offer the statements she later made to Donner about calling Al-Derawi on the day of the assault.

evidence of her state of mind when making the statement to the defense investigator. The State also informed the court that it had information that Al-Derawi was making phone calls from the jail to someone in which he discussed trying to convince Denny not to come to court and telling her to write a letter to the prosecutor denying that the assault happened.

The State argued that the doctrine of forfeiture by wrongdoing should bar any objection Al-Derawi had to evidence of the 2005 assault and should provide an additional basis for admitting Denny's excited utterances in the charged assault. The trial court rejected the State's argument and ruled that the doctrine of forfeiture by wrongdoing did not provide a basis for admitting otherwise inadmissible hearsay statements. The court then allowed the State to present evidence about the 2005 assault under ER 404(b) as evidence of Denny's state of mind, but would not allow the State to present any hearsay statements she made to the officers about that assault.

The jury found Al-Derawi guilty as charged. The trial court imposed a standard range sentence. The court also imposed the following conditions of community custody: (1) to obtain a substance abuse evaluation and follow all treatment recommendations and (2) to refrain from possessing alcohol.

DISCUSSION

I. Excited Utterances

Al-Derawi contends that the trial court erred by admitting evidence of Denny's statements to Donner because they contained fabrications and therefore did not qualify as excited utterances. We disagree.

We review a trial court's decision to admit evidence under the excited utterance exception to the hearsay rule for an abuse of discretion.[3] An excited utterance is a statement made while the declarant is still under the influence of a traumatic event, such that the statement is not the product of reflection or deliberation.[4] Spontaneity, the passage of time, and the declarant's state of mind are factors courts consider to determine whether a statement is an excited utterance, i.e., whether it is a deliberate assertion or the product of reflex or instinct.[5] Thus, a court may admit a hearsay statement as an excited utterance if the following requirements are met: (1) a startling event or condition occurred, (2) the statement was made while the declarant was still under the stress of the startling event, and (3) the statement related to the startling event.[6]

In State v. Brown, the court held that a rape victim's statements made during a 911 call were not admissible as excited utterances when she fabricated part of her statement and made the decision to fabricate it before calling the police.[7] There, the victim called 911 and reported that she was abducted, forced into an apartment, and raped repeatedly by four men at gunpoint.[8] She later admitted that she was not abducted, but went willingly into the apartment after agreeing to engage in oral sex with the defendant for money.[9] After the attack, she told her boyfriend she was reluctant to

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[3] State v. Briscoeray, 95 Wn. App. 167, 171-72, 974 P.2d 912, 139 Wn.2d 1011 (1999).
[4] ER 803(a)(2); State v. Woods, 143 Wn.2d 561, 600, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001).
[5] State v. Palomo, 113 Wn.2d 789, 791, 783 P.2d 575 (1989), cert. denied, 498 U.S. 826 (1990).
[6] State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).
[7] 127 Wn.2d 749, 903 P.2d 459 (1995).
[8] Id. at 752.
[9] Id.

call 911 because she thought the police would not believe her if she admitted that she went willingly into the apartment and because the police knew she was a prostitute.[10] The boyfriend then suggested that she "think of something."[11] She admitted that after the conversation with her boyfriend, she decided to tell the police that she had been abducted.[12]

On appeal, the court reiterated that "the 'key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'"[13] The court then held that her statements made during the 911 call were not admissible as excited utterances because she "had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call."[14] Thus, she had the "apparent ability to reflect on the credibility of her story prior to making the 911 call."[15]

But in State v. Magers, the court concluded that the fact that an assault victim told the police a falsehood "does not mean that the remainder of her statements were not spontaneous and truthful," and held that her statements to an investigating officer were admissible as excited utterances.[16] There, someone other than the victim called 911, and when the police responded and asked the victim if the defendant was at the

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[10] Id. at 753.
[11] Id.
[12] Id.
[13] Id. at 758 (alteration in original) (internal quotation marks omitted) (quoting State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)).
[14] Id. at 759.
[15] Id. at 757.
[16] 164 Wn.2d 174, 188, 189 P.3d 126 (2008).

house, she said he was not there but later admitted this was not true. The court rejected the defendant's argument that the victim's statements were not excited utterances because the victim had the capacity to consider her situation and decide not to respond truthfully. The court noted that it was reasonable to conclude that her initial statement to the officer that the defendant was not at her home was due to her fear of the defendant.[17]

In State v. Woods, the court held that an attempted murder victim's statements were excited utterances, even though she omitted details that bore on the credibility of the statements.[18] While at the hospital after being attacked, the victim told her father that she awoke to somebody holding a knife to her who took her to another bedroom, pointed to her friend who had been badly beaten, and told her that she would end up like her friend if she did not do exactly what he said.[19] Relying on Brown, the defendant argued that the statement was not an excited utterance because the victim failed to tell her father that she had been out drinking, that she wanted to buy drugs from the defendant and that she was still up and ready to "'party'" at 3:30-3:45 a.m. Thus, the defendant argued, she had time to reflect and consider her own self interest before making the statement.[20]

The court declined to hold that these omissions were equivalent to the fabricated story in Brown:

> Unlike the situation in Brown, there is no evidence here that [the victim] had spun a story so that she would sound more credible to the authorities. Even if we assume that [the victim] consciously omitted certain

[17] Id.
[18] 143 Wn.2d 561, 601, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001).
[19] Id. at 596.
[20] Id. at 600.

> information from her statements to her father, we do not believe her act of omission is at all comparable to the deception we observed in Brown. The alleged victim in Brown affirmatively hatched a story to bolster her own credibility. [The victim here], on the other hand, merely failed to relate information about certain events in the evening. The fact that [she] failed to provide details about the previous night during her brief encounter with her father, especially after being brutalized in such an egregious manner, is not comparable to the fabrication of fanciful statements that we saw in Brown.[21]

Al-Derawi argues that as in Brown, Denny's statements to Donner should have been excluded because she fabricated the portion of her statement that he came to her apartment unannounced and without her permission. But our review of the record shows that Donner did not testify that Denny told him that Al-Derawi came to her apartment uninvited. Rather, Donner testified only that "she said that she had been home, and then all of a sudden he walked in the back door," that she was "surprised that he walked in," and that she said, "he came up, walked in, and she wasn't expecting him at that point." As the trial court found:

> [W]e don't even have testimony from the deputy [Donner] that . . . Ms. Denny said anything about how the defendant got there. Whether he was invited or whether he came in. I don't think we do. I think he was unsure about the time when she might have told him that. We know that she told him one thing, and then later admitted that the defendant -- that she had called the defendant over there. I'm not disputing there's an indication that she did, in fact, reverse her story or change her story. But during those statements . . . to the detective early on, I'm sorry, to the deputy early on it's not clear that that was a statement that she made.

Thus, the only statements Al-Derawi can point to as possible fabrications are when she said he appeared "all of a sudden," she was surprised, and she was not expecting him at this point. But these statements alone do not amount to undisputed

[21] Id.

fabrication; while she may have invited him over earlier in the day, it is also conceivable that she was not expecting him at that point and that he surprised her when he appeared suddenly. This is hardly comparable to the undisputed fabrication of "fanciful statements" held to be inadmissible in Brown. Rather, Denny "merely failed to relate information about certain events," i.e., that she actually called him earlier and invited him over at some point that day. As in Woods, the omission of this additional information is not equivalent to a fabrication and does not disqualify the statement as an excited utterance.

Nor was there any evidence that Denny made the decision to fabricate before she reported the incident, like the victim in Brown. In fact, Denny did not make the 911 call or otherwise summon the police for help; the police responded because her neighbor made the call, and her statements were made in response to unsolicited police questioning. Thus, unlike in Brown, it was not apparent that she had the opportunity and ability to reflect on the credibility of her story before deciding to speak to the police. Rather, Denny made the statements while still under the stress of the assault, and there was no evidence that they were the product of reflection rather than reaction to the stressful event. Indeed, the record indicates that she was hysterical, crying, and upset throughout Donner's questioning. Thus, as in Magers, even if she was untruthful about how Al-Derawi arrived at her apartment, "[that] does not mean that the remainder of her statements were not spontaneous and truthful."[22] As the trial court here concluded:

> the issue is the opportunity to fabricate, the decision to fabricate, and whether or not that's going to render a statement unreliable essentially in

[22] 164 Wn.2d at 188.

> toto, which is what the defense is asking here, and I simply don't find that the fact that she may have said at some point, and again we don't know whether it was even in the context of the statements that are being offered[,] that the defendant came over on his own rather than her inviting him. I don't see that as the product of an opportunity to and a decision to fabricate the crux of this statement, which is what he did once he was at the apartment.

As in Woods and Magers, Denny's statements were admissible as excited utterances, and we hold that the trial court did not abuse its discretion by admitting them on this basis. Thus, we need not address the State's argument that the trial court could have also admitted the statements under the doctrine of forfeiture by wrongdoing.

II. Conditions of Sentence

Al-Derawi next challenges the conditions of community custody requiring him to obtain a substance abuse evaluation and follow all treatment recommendations and to refrain from possessing drugs or alcohol. He contends that both conditions should be vacated because there was no evidence that either alcohol or substance abuse was related to the charged crime. He further contends that the condition prohibiting possession of "drugs" is too broad because it encompasses more than "controlled substances" and includes prescription controlled substances which are not illegal to possess.

The State concedes that "[t]here is no evidence that drugs or alcohol contributed to Al-Derawi's offense" and that the trial court therefore lacked authority to impose these conditions. The State requests remand for clarification, noting that the trial court "may" prevent Al-Derawi from consuming (rather than possessing) alcohol under RCW 9.94A.700(5)(d) and "shall" require him to refrain from possessing or consuming controlled substances, except by lawfully issued prescriptions under RCW 9.94A.700(4)(c). We therefore strike the conditions and remand for resentencing.

We affirm the conviction and remand for resentencing.

Ajid, J.

WE CONCUR:

Leach, J.

Ellington, J.